DING LAENG & ORS

v.

MINISTER OF PLANNING AND RESOURCE MANAGEMENT & ORS

HIGH COURT SABAH & SARAWAK, MIRI
RAVINTHRAN PARAMAGURU JC
[SUIT NO: MR-21-11-2011]
15 MAY 2012

CIVIL PROCEDURE: *Striking out - Claim for native customary rights - Whether action maintainable - Appeal pending in Superior Chief's Court over same land - Whether multiplicity of proceedings - Rules of the High Court 1980, O. 18 r. 19(1)(b) and (d)*

LIMITATION: *Public authorities - Whether action time barred - Native customary rights over land - Whether plaintiff's claim for declaratory relief caught by limitation*

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Whether infringement in plaintiff's native customary rights - Whether native customary rights established - Whether action maintainable*

This was an application by the defendants to determine questions of law under O. 14A of the Rules of the High Court 1980 ('RHC') or in the alternative to strike out the plaintiffs' suit under O. 18 r. 19 of the RHC. The plaintiffs brought a representative action that they possess native customary rights ('NCR') over a parcel of land on which the fourth defendant had been issued a licence for planted forests ('LCF') since 1998 by the first and second defendants. The first and second defendants had not extinguished nor compensated the plaintiffs prior to the issuance of the LCF. The plaintiffs averred that the land in question was their NCR land from time immemorial and that the first to the third defendants had interfered with their proprietary rights. The first to the sixth plaintiffs had commenced a proceeding over the same parcel of land in the Chief's Court against one TK Gilbert Laing Ding and it was ruled that the land in question was a State Land and not an NCR land. The plaintiffs appealed against the decision to the Superior Chief's Court and the appeal was still

A pending. Without waiting for the decision, the plaintiffs filed the instant suit. The defendants contended, *inter alia*, that: (i) the action was not maintainable since the plaintiffs had not pleaded fraud or collusion in the statement of claim; (ii) that the action was barred by limitation; and (iii) the action was *res judicata* and
B not maintainable since the appeal from the Chief's Court was still pending over the status of the same land.

Held (allowing defendant's application to strike out plaintiff's claim with costs):

C **(1)** The action could not be struck off merely because fraud or collusion were not pleaded. If the plaintiffs were able to establish NCR over the land, it would have been a pre-existing right and therefore it could have defeated the title or licence issued by the government. The government's right and
D interest to the land was subject to the pre-existing native rights. (para 11)

(2) In light of the first, second and third defendants' contention that the claim was time barred, the court adopted the view of
E *Balare Jabu & Ors v. Merawa Sdn Bhd & Ors* which held that although limitation appeared to be a complete answer to a suit, action or proceeding for remedy, it was no answer to the same for declaratory orders. Further, since the defendants were unable to produce the written judgment or the broad
F grounds of judgment, the question could not be answered in the defendants' favour. (paras 12 & 13)

(3) The plaintiffs' pending appeal in the Superior Chief's Court involved the issue of whether the land in question was NCR
G land and it was probable that the matter would proceed to the Native Court of Appeal. This could lead to the possibility of two inconsistent decisions by two legally constituted courts. The situation could have been avoided if the plaintiffs had waited for the outcome of the appeal process in the Superior
H Chief's Court or otherwise had elected to pursue their claim solely with the High Court. Even though *res judicata* was not strictly applicable, the plaintiffs' claim was an abuse of process of the court. (paras 14 & 15)

I

Case(s) referred to:

Balare Jabu & Ors v. Merawa Sdn Bhd & Ors [2011] 4 CLJ 751 CA ***(foll)***
Husli @ Husly Mok v. Superintendent of Lands & Surveys & Anor [2012] 1 LNS 969 CA ***(dist)***
Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***
Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***
Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***
Ramsay Noel Jitam & Anor v. Khidmat Mantap Sdn Bhd & Ors [2011] 1 LNS 154 HC ***(refd)***
Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal [2005] 3 CLJ 555 CA ***(refd)***
Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:

Land Code, ss. 5(1), (2), 202
Native Court's Ordinance 1992 (Cap 43), s. 22
Rules of the High Court 1980, O. 14A, O. 18 r. 19(1)(b), (d)

For the plaintiffs - Harrison Ngau Laing; M/s HNL & Co
For the 1st-3rd defendants - Saferi Ali; AG's Chambers
For the 4th defendant - Tan Thiam Teck; M/s The Law Firm

Reported by Sandra Gabriel

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application by the defendants to determine questions of law under O. 14A of the Rules of the High Court 1980 and strike out the suit of the plaintiffs. The defendants are also alternatively praying for striking out under O. 18 r. 19 of the Rules of the High Court 1980.

Brief Facts Of The Plaintiffs' Claim

[2] The seven plaintiffs have brought this representative action on behalf of other residents of Kampung Long Panai in Sg Tutoh Baram, Miri Division principally for a declaration that they possess Native Customary Rights (NCR) over a large parcel of land

(delineated in red and marked B on the map annexed to the statement of claim) on which the 4th defendant had been issued with a Licence for Planted Forests (the LCF) No. LPF/0011 since 1998. The 4th defendant is the joint venture company of the Sarawak Timber Industry Development Corporation and KTS Sdn Bhd. The plaintiffs have pleaded lengthy facts to support their claim that the land in question is their NCR land from time immemorial. The 1st and 2nd defendants issued the LCF on the land in question to the 4th defendant in 1998. It is due to expire in 2058. The 1st and 2nd defendants did not extinguish and compensate the plaintiffs prior to the issuance of the LCF. In the premises, the plaintiffs averred that the 1st to 3rd defendants had interfered with the proprietary rights of the plaintiffs in breach of the Federal Constitution, the Land Code and their fiduciary duty to the natives as well.

Defence Of The 1st To 3rd Defendants

[3] The 1st to 3rd defendants pleaded that the purported NCR was not created over the said land in accordance with s. 5(1) and (2) of the Land Code and, therefore, the question of extinguishment of NCR and compensation did not arise. They pleaded limitation as the LCF was issued in 1998 but the suit was only filed 13 years later in 2011.

Defence Of The 4th Defendant

[4] The 4th defendant's defence briefly stated that:

(a) They have been duly granted the LCF since 1998.

(b) The map "B" was not drawn by a land surveyor.

(c) That the Chief's Court had ruled on the status on the land pursuant to an action initiated by the 1st and 6th plaintiffs.

(d) That the claim is barred by the Land Code, Limitation Ordinance of Sarawak and the Public Authorities Protection Act 1948.

Order 14A/O. 18 r. 19(1)(b) Or (d) Applications

[5] The 1st to 3rd defendants and the 4th defendant have both filed separate O. 14A and O. 18 r. 19(1)(b) or (d) applications. However, except for the affidavits in support, the grounds of both

applications are virtually identical. I, therefore, heard both applications together. The grounds of the application for questions of law to be determined without a full trial are as follows;

(a) Whether the action is maintainable because the Chief's Court had in its judgment in an action between the 1st and 6th plaintiff and one Gilbert Ding Laing decided that the land within the LCF is State Land and not NCR land and that the appeal against this decision is still pending.

(b) Whether this action is maintainable when there is no plea of fraud and/or collusion against the defendants insofar as the issuance of the LCF is concerned;

(c) Whether the plaintiffs should have challenged the decision of the 2nd defendant by way of Judicial Review action instead of writ action;

(d) Whether it is proper to file an action in court when under the Land Code it is for the Settlement Officer to investigate NCR claims; and

(e) Whether this action is barred by limitation?

[6] However, during argument, the 1st to 3rd defendants relied on questions (a), (b) and (e) only. The 4th defendant pursued questions (a) and (b) only.

Jurisdiction Of Court Under O. 14A

[7] Order 14A reads as follows:

> (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

A

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

B

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19, or any other provision of these rules.

C **[8]** The Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 said as follows:

> In a nutshell, the Order enables the court to determine any question of law or construction of document where it appears to
D the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein.

[9] In the instant case, the defendants had framed five questions of law in the summons in chambers. I had reproduced the said
E five questions earlier. In an O. 14A application, it is essential that the question of law be framed in clear and precise terms and that the answer upon the question or questions would dispose of the case or a major part of the case. In this application, I need only answer whether this action can be disposed of on three questions
F of law as two questions have been abandoned. Counsel for plaintiff has not taken issue that the questions were not clear or precise and has made submissions in reply.

Questions Based On Grounds (b) And (e)

G

[10] The question based on ground (b) is whether the action is maintainable because there is no plea of fraud or collusion in the statement of claim. The argument of defendants is based on the following passage from the judgment in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 where the court
H said as follows in respect of the right of the holder of forest timber licence:

> Even though there is no like provision in the Forest Ordinance as the Land Code on indefeasibility of title, nevertheless, in my
I view unless the native customary rights claimants can prove fraud and collusion between the Director of Forest and the licensee, the claimants right of complaint should lie with the issuing authority and not the licensee.

> [23] My reasoning above is also premised upon the very principle in which a court action should be based and that is 'actionable wrong'. The plaintiffs must on the face of the pleading show that the 1st defendant here had, through their own acts and/or omission, caused the deprivation of the plaintiffs' right to the land. Simply having their name on the forest licence (or the lease for that matter) is in my view insufficient to constitute an actionable wrong.

[11] With respect, counsel for the 4th defendant cannot succeed in knocking out the claim of the plaintiffs merely because fraud and collusion were not pleaded. Assuming that the plaintiffs are able to establish NCR over the land in question, it is a pre-existing right and, therefore, it can defeat the title or licence issued by the government authority. Therefore, it would be unnecessary to prove fraud or collusion. In *Ramsay Noel Jitam & Anor v. Khidmat Mantap Sdn Bhd & Ors* [2011] 1 LNS 154, Linton J declined to follow *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 on this point and endorsed the view from the cases of *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509, *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555 and *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169 that the government's right or interest to land is subject to pre-existing native rights, if any.

Whether Action Barred By Limitation Law?

[12] This question is being pursued only by the 1st to 3rd defendants. The argument is that the claim is barred by s. 202 of the Land Code which only provides a limitation period of three years for recovery of damages from the government as well as the Public Authorities Protection Act 1948 and the Sarawak Limitation Ordinance (Cap. 49). The limitation issue in respect of an NCR claim was also raised in the Court of Appeal case of *Balare Jabu & Ors v. Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751. The Court of Appeal answered the question in the following manner:

> While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders. A declaration whether the issuance of a licence is subject to native customary rights and whether the 2nd and 3rd respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic.

[13] The above case is currently pending appeal to the Federal Court. Counsel for 1st to 3rd defendants intimated to the court *via* e-mail that on 17 April 2012, another panel of the Court of Appeal which sat in Kuching in the case *Husli @ Husly Mok v. Superintendent of Lands & Surveys & Anor* (Q-01(IM)-716-2010) [2012] 1 LNS 969 had taken a contrary position. However, counsel for 1st to 3rd defendants was unable to make available the written judgment or the broad grounds of judgment. In the premises, I am not in a position to answer the question in favour of the defendants.

Whether Action Maintainable As An Appeal From The Chief's Court Is Still Pending Over The Status Of The Same Land?

[14] The defendants referred to a case in the Chief's Court where the 1st and 6th plaintiffs had sued one TK Gilbert Laing Ding over the same parcel of land. The Chief's Court had heard evidence and made a ruling in 2009 that the land in question is state land and not NCR land as claimed by the plaintiffs. The affidavit in opposition of the plaintiffs was sworn by the 1st plaintiff. He alleged that one Penghulu Herbert Lawai Apoi should not have presided in the Chief's Court because he and TK Gilbert Laing Ding supported the interest of the 4th defendant to develop the land between their two longhouses. The 1st plaintiff said that the Chief's Court did not justify its decision with grounds. The plaintiffs have appealed against the decision of the Chief's Court to the Superior Chief's Court. The appeal is still pending. The decision is ultimately appealable to the Native Court of Appeal. The argument of counsel for the 1st to 3rd defendants and counsel for 4th defendant is that in view of the pending appeal by the plaintiffs, the matter is *res judicata* and that the plaintiffs are guilty of abuse of proceedings by starting an action in this court. The defendants relied heavily on the case of *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80; [1970] 2 MLJ 41 where the Federal Court said that it is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available. In *Manggai*'s case the brief facts are as follows. The applicant had a dispute with a fellow native over a land matter. The District Native Court gave judgment in his favour. On appeal to the Resident's Court, the decision was quashed. Instead of pursuing his right of appeal to the Native

Court of Appeal, the applicant applied to the High Court for a declaration, *inter alia*, that the Resident's Native Court was *functus officio* and without jurisdiction to hear the case by way of appeal or otherwise and that the purported judgment delivered by that court was null and void. The High Court refused the declaration on the ground there was an adequate alternative remedy available to him to appeal to the Native Court of Appeal under the Native Courts Ordinance (Cap 43). This decision was affirmed by the Federal Court. Counsel for defendants argued in this case that the 1st and 6th plaintiffs had actually taken a further step in the matter before the Chief's Court as they had filed an appeal to the Superior Chief's Court. However, without waiting for the decision of the Superior Chief's Court on their appeal, they have filed the instant suit before this court and the principal remedy sought is for a declaration that the land in question is NCR land. Counsel for plaintiff submitted that the doctrine of *res judicata* would not apply as the decision of the Chief's Court is not final as it is still appealable. Furthermore, the judgment of the Native's Court has to be served on the Director of Lands and Surveys Department who may issue a Notice of Objection under s. 22 of Native Court's Ordinance to the Native Court to confirm or vary the judgment. Be that as it may, counsel for plaintiffs has not addressed the issue of abuse of process and the principle in *Manggai*'s case. The matter before the Chief's Court was initiated by the 1st and 6th plaintiffs themselves and upon being unsuccessful in that court, they have filed an appeal against the decision. However, while awaiting the outcome of the appeal, they have filed a civil suit in the High Court. It may well be that the plaintiffs have pleaded other issues in the High Court case such as fraud, collusion and breach of fiduciary duty. However, the principal issue in the pending appeal before the Superior Chief's Court, apart from the issue of demarcation of boundary between the longhouses, is whether the land in question is NCR land. The plaintiffs have not even indicated whether they are abandoning the appeal. It is probable that the matter could proceed all the way to the Native Court of Appeal as provided by Native Court Ordinance 1992. Thus, it is entirely possible that there could be two inconsistent decisions by two legally constituted courts on the status of the same parcel of land. This situation could have been avoided if the plaintiffs had waited for the outcome of the appeal process in the Superior Chief's Court or otherwise had elected to pursue their claim solely in the High Court.

[15] The LCF was, after all, issued in 1998. Thus, in my opinion, even if the doctrine of *res judicata* is not strictly applicable, the plaintiffs' claim is clearly an abuse of the process of the court.

[16] I shall, therefore, strike out the claim of the plaintiffs. I shall make an order of costs of RM2,000 in favour of the 1st to 3rd defendants and an order of costs of RM3,000 in favour of the 4th defendant.